UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 29, 2010

CBCA 1865

TENDERFOOT EQUIPMENT SERVICES,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

John Stephen Ward, Owner of Tenderfoot Equipment Services, Lakeview, OR, appearing for Appellant.

Benjamin R. Hartman, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **GILMORE**, **VERGILIO**, and **POLLACK**.

GILMORE, Board Judge.

Appellant, Tenderfoot Equipment Services (Tenderfoot), seeks to appeal the final decision of a contracting officer (CO) of the United States Department of Agriculture (USDA) denying appellant's claim that USDA breached a blanket purchase agreement (BPA) by failing to offer water handling equipment dispatches to Tenderfoot in the manner set forth in the BPA.

After the appeal was docketed, USDA filed a motion to dismiss the appeal on the ground that the BPA is not itself a contract as required for Board jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2006). USDA contends that a contract does not come into existence under a BPA until an equipment dispatch is offered by the Government and accepted by the contractor to which the offer was made, and that the Board has no jurisdiction to hear a protest by appellant that it was unfairly denied an offer under the BPA. Appellant opposes the motion, contending that the BPA contained terms agreed upon by both parties and that it is unfair for USDA to now refer to the "contract" as only a non-binding agreement, when the solicitation referred to provisions in the agreement as "Contract Terms and Conditions." As binding precedent from the Federal Circuit dictates, no contract arose from the BPA itself. Accordingly, the Board does not have jurisdiction under the CDA to decide this appeal.

Background

On April 1, 2007, the USDA, Forest Service, issued a request for quotations (RFQ) to water handlers in Region 6 of the Forest Service, which includes the states of Oregon and Washington. The intent of the solicitation was to obtain water handling equipment services when needed for local, regional, and nationwide fire suppression. Appeal File, Exhibit 1 at 11. Tenderfoot was one of the companies that received the RFQ, and it submitted a price quotation to the USDA.

The solicitation states that the BPA resulting from the solicitation will be in the form of an Emergency Equipment Rental Agreement which can be used by multiple state and federal agencies. The solicitation further states that the solicitation will result in multiple award daily rate agreements with per-day prices and that "[d]ue to the sporadic occurrence of incident activity, the placement of any orders IS NOT GUARANTEED." Appeal File, Exhibit 1 at 11.

In section D.5, AVAILABILITY, the solicitation provides that the contractor is responsible for maintaining its current status by informing its host dispatch center of its equipment availability, and that when contract equipment is not available, the equipment will not be eligible for dispatch under the BPA. Appeal File, Exhibit 1 at 23.

In section D.6, ORDERING PROTOCOL FOR EQUIPMENT, the solicitation provides that the BPA "does not preclude the Government from using any Agency or Agency Cooperator owned resources before equipment is mobilized" under the BPA. It further provides that the contractor shall restrict calls to the host dispatch center only, and that dispatchers will not provide information such as "when or if the contractor will be called for an assignment" or "status of other contractors." Appeal File, Exhibit 1 at 23.

Section D.6.1, DISPATCH PRIORITY, provides that the host dispatch center will give priority to equipment offering the greatest advantage to the Government for emergency wildland fire suppression, all-hazard, and severity assignments, before all other private resources not under this agreement, with certain exceptions, such as the use of "closest forces" for initial attack, the use of tribal preference policies within reservation jurisdictions, and the use of veteran-owned small businesses. This provision further provides:

> Government normally will dispatch resources in accordance with this protocol; however, the number of fire orders in process and actual fire conditions at the time of dispatch may require a deviation from normal procedures in order to respond effectively to such conditions. *Any such deviation will be within the discretion of the Government, and will not be deemed a violation of any term or condition of this Agreement.*

Appeal File, Exhibit 1 at 23 (emphasis added).

Sections D.6.2 and 6.3 provide that the contractor's equipment will be ranked for purposes of dispatch priority, based on such factors as the mechanical condition of the engine, age, pump performance, and tank capacity, with each category being assigned a point value, which points will be used to determine a final dispatch priority number for the contractor's equipment. These sections further provide that after award, each host dispatch center will have an established priority dispatch list showing equipment located within its dispatch zone, and that the Government intends to dispatch equipment on this priority ranking for other than initial attack, with certain stated exceptions. Appeal File, Exhibit 1 at 23.

The Emergency Equipment Rental Agreement, made a part of the solicitation, contains the following relevant provision:

> Since the equipment needs of the Government and availability of Contractor's equipment during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the Government, the Contractor shall furnish the equipment listed herein to the extent the Contractor is *willing and able at the time of the order.*

Appeal File, Exhibit 1 at 35 (emphasis added).

Tenderfoot responded to the RFQ and quoted a price of $1447 per day for its water handling equipment. Appeal File, Exhibit 1 at 8-10. On June 6, 2008, the USDA established a BPA with Tenderfoot for water handling services, agreement no. AG-04H1-C-8190,

effective until June 6, 2011. The BPA incorporates all of the terms of the initial RFQ and Tenderfoot's proposal.

Appellant was originally ranked number eleven on the dispatch priority list maintained by the dispatch host center in its dispatch zone, and allegedly due to an error made by the Forest Service when it was updating the dispatch priority list, Tenderfoot was inadvertently dropped from number eleven to number twenty-three, when it should have remained at number eleven. Tenderfoot immediately notified the USDA and the dispatch center of the error. Appellant alleges that because of initial inaction on the part of persons responsible for correcting the list, it took approximately six days to correct the error, and that during this period, dispatches were offered to companies with a lower ranking than Tenderfoot when they should have been offered to Tenderfoot.

On November 10, 2009, Tenderfoot filed a claim with the USDA CO alleging that USDA did not dispatch equipment orders in the manner stated in the agreement, which caused Tenderfoot to lose six days of equipment rentals at $1447/day, for a total loss of $8682.

Respondent's Motion to Dismiss for Lack of Jurisdiction

Respondent has moved the Board to dismiss appellant's claim for lack of jurisdiction on the ground that the BPA entered into between the parties is not itself an express or implied contract which is required for jurisdiction under the CDA. Respondent cites *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058 (Fed. Cir. 2002), as legal precedent for this issue. In *Ridge Runner*, the Court of Appeals for the Federal Circuit held that a BPA almost identical to the one in this appeal is not a binding contract, because the contractor's promise to provide services only if it was "willing and able" was an illusory promise and, therefore, insufficient to form a binding contract. *Id*. at 1062. Appellant counters that it agreed to have its equipment available and in the required mechanical condition; that it submitted a price acceptable to USDA, and that the USDA agreed to dispatch tenders according to a dispatch priority list. Appellant argues that it considered the BPA to be a binding agreement on price, equipment availability, and dispatch requirements, and that because the USDA did not dispatch orders in the manner set forth in the BPA, it caused Tenderfoot to lose expected work. Tenderfoot argues that the solicitation commonly refers to "contract terms and conditions," "contractor," and "contracting officer" and, thus, Tenderfoot believed that the equipment rental agreement was a binding contract.

Discussion

The CDA governs the resolution of disputes between executive agencies and private contractors related to procurement contracts. The Board's jurisdiction arises from section 3(a) of the CDA, which limits appeals to those relating to an express or implied contract entered into by an executive agency for the procurement of services and property, other than real property, and the disposal of personal property. 41 U.S.C. § 602(a).

The question here is whether the BPA entered into between appellant and the USDA is an express or implied contract for purposes of invoking Board jurisdiction under the CDA. We agree with respondent that the Emergency Equipment Rental Agreement is a BPA and is not a contract subject to Board jurisdiction. As explained in the Federal Acquisition Regulations (FAR), 48 CFR 16.703(a) (2009):

> A basic ordering agreement is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and a contractor, that contains (1) terms and clauses applying to future contracts (orders) between the parties during its term, (2) a description, as specific as practicable, of supplies or services to be provided, and (3) methods for pricing, issuing, and delivering future orders under the basic ordering agreement. A basic ordering agreement is not a contract.

Here, when a company provides a quote in response to the RFQ, if it is determined that the company meets the standards required for providing the services and the quotation is reasonable, that company is awarded an Emergency Equipment Rental Agreement which the solicitation states is simply a BPA. The BPA provides the basic agreement as to how dispatches will normally be made and what terms and conditions would govern any contract entered into as a result of the Government offering a dispatch to a contractor and the contractor agreeing to provide the equipment. A contract does not come into existence until the Government dispatches an equipment order and the contractor accepts that dispatch. Appellant argues that the use of the words "agreement," "contractor" and "contract terms and conditions" in the solicitation and resulting BPA led it to reasonably believe that a binding contract arose. However, the use of the words "contractor" and "contract terms and conditions" in the BPA does not make the BPA itself a binding contract. The first paragraph of the Emergency Equipment Rental Agreement clearly states:

> Since the equipment needs of the Government and the availability of Contractor's equipment during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the Government, the Contractor shall furnish the equipment listed herein to the extent the

> Contractor is *willing and able at the time of order . . . . When such equipment is furnished to the Government, the following provisions shall apply*.

Appeal File, Exhibit 1 at 35 (emphasis added).

In *Ridge Runner*, the Court of Appeals for the Federal Circuit considered a similar equipment rental agreement between the USDA and a water tender company, and concluded that the agreement was not a contract. The Court upheld the dismissal of that appeal for lack of jurisdiction. 287 F.3d at 1062. The equipment agreement in that case contained the same "willing and able" language as is found in this agreement. *Id*. at 1060. As the Federal Circuit noted: "It is axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less illusory promises of both parties." *Id*. at 1062.

As with the agreement considered by the Court, here, the appellant was not obligated to accept a government offer. Consistent with the Court's opinion and the FAR, we conclude that no contract arose under the BPA itself and, thus, we have no jurisdiction to decide the appeal. We grant respondent's motion to dismiss.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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BERYL S. GILMORE
Board Judge

We concur:

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JOSEPH A. VERGILIO
Board Judge

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HOWARD A. POLLACK
Board Judge